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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **LOS ANGELES DIVISION**

11 In re

Case No. 2:23-bk-10990-SK

12 **LESLIE KLEIN,**

Chapter 11

13 Debtor.

Adv. No. 2:23-ap-01150-SK

14 **ERICA VAGO and JOSEPH VAGO,**

15 Plaintiff,

**REPLY TO OPPOSITION TO MOTION
FOR ORDER DISMISSING CERTAIN
CAUSES OF ACTION IN COMPLAINT**

16 v.

17 **LESLIE KLEIN,**

18 Defendant.

Date: October 18, 2023
Time: 9:00 a.m.
Place: Courtroom 1575

1 Defendant, Leslie Klein (“**Klein**” or “**Defendant**”), hereby files his reply (“**Reply**”) to the
2 opposition (“**Opposition**”) to the Motion for Order Dismissing Certain Causes of Action in
3 Complaint (“**Motion**”) filed by Erica Vago and Joseph Vago (“**Plaintiff**” or “**Vago**”) to the
4 Complaint to Determine the Nondischargeability of Certain Debts Owed by Debtor Leslie Klein to
5 Erica and Joseph Vago Pursuant to 11 U.S.C. § 523 and To Deny Discharge Pursuant to Section
6 727(a)(12) (“**Complaint**”) on the following grounds:

7 The Defendant argues in its Opposition that the Fourth Cause of Action (11 U.S.C §
8 727(a)(12), (the “**727 Causes of Action**”) is appropriate because it somehow is consumed in 11
9 U.S.C. § 1141(d)(3), and therefore it is somehow appropriate to plead the 727 Causes of Action in
10 a chapter 11 bankruptcy case.

11 This just simply is not the law under the Bankruptcy Code.

12 **First**, these causes of action are only applicable to chapter 7 individual debtors. The
13 Debtor herein and the bankruptcy case is a chapter 11 bankruptcy case.

14 11 U.S.C § 103 provides:

15 (a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in
16 a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555
17 through 557, and 559 through 562 apply in a case under chapter 15.

18 (b) Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.

19 The 727 Causes of Action are part of Subchapter II of chapter 7, therefore according to
20 Section 103(b) they can only apply to a case under chapter 7 bankruptcy cases.¹

21 The provisions of 11 U.S.C § 103 cannot be ignored by the Defendant. Given the plain
22 language of section 103(b), it is appropriate to note the basic canon of statutory construction that
23 when the language of a statute is plain, the sole function of a court is to enforce it according to its
24 terms, unless the disposition required by the text is absurd. Lamie v. U.S. Trustee, 540 U.S. 526,
25 534, 124 S. Ct. 1023 (2004); Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530

26
27 ¹ Chapter 11 has its own timing and Bankruptcy Code section that applies to the debtor’s
28 discharge of debts. See Section 1141. In a chapter 11 case, the complaint shall be filed no later
than the first date set for hearing on confirmation. FRBP 4004(a).

1 U.S. 1, 6, 120 S. Ct. 1942 (2000) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S.
2 235, 241, 109 S. Ct. 1026 (1989) (in turn quoting Caminetti v. United States, 242 U.S. 470, 485,
3 37 S. Ct. 192, (1917)). The plain language of section 103(b) is clear that “Subchapters I and II
4 of chapter 7 of this title apply only in a case” under chapter 7. Thus, the fact that section 727 is
5 referenced in section 1141(d)(3) is irrelevant to the chapter 11 adversary proceeding, thus, the 727
6 Causes of Action do not apply in a chapter 11 bankruptcy case. Whiting Pools, 462 U.S. 198, 204
7 (1983).

8 **Second**, 11 U.S.C. § 1141(d)(3) states –

9 **(3)**The confirmation of a plan does not discharge a debtor if—

10 **(A)** the plan provides for the liquidation of all or substantially all of the property of the
11 estate;

12 **(B)** the debtor does not engage in business after consummation of the plan; **and**

13 **(C)** the debtor would be denied a discharge under section 727(a) of this title if the case
14 were a case under chapter 7 of this title.

(emphasis added)

15 Thus for section 1141(d)(3) to be applicable , the debtor has to propose a
16 liquidating plan, does not engage in business after confirmation, **and** would be denied
17 a discharge under § 727(a) **if this were** a chapter 7 case. Torrington Livestock Cattle
18 Co. v. Berg (In re Berg), 423 B.R. 671 (B.A.P. 10th Cir. 2010). All three (3) elements
19 are required and at this point in the bankruptcy case, the Debtor has not proposed a
20 plan of reorganization (therefore the first element cannot be met until a plan of
21 reorganization is proposed, and it also is undetermined if the Debtor will engage in
22 business after confirmation. These two (2) elements are required and must be plead
23 for application of section 1141(d)(3). They cannot at this point in time and that’s why
24 the bankruptcy code sets a time to file such adversary proceeding as the complaint shall
25 be filed no later than the first date set for hearing on confirmation of the chapter 11 plan of
26 reorganization. FRBP 4004(a).
27
28

1 In Berg, the bankruptcy court denied the debtor's discharge under § 727(a)(3),
2 on the grounds that he failed to maintain business records sufficient to allow the
3 court to determine his financial condition or the propriety of his prepetition
4 transactions, and that he failed to justify the lack of adequate records. The BAP
5 reversed and remanded because the bankruptcy court had failed to make findings on
6 two of the three elements required under § 1141(d)(3). "All three elements of §
7 1141(d)(3) must be established before a Chapter 11 debtor's discharge may be denied.
8 A Chapter 11 discharge cannot be denied solely on the ground that the debtor would
9 have been denied a discharge under Chapter 7." (emphasis added)

10 In Wachovia Securities, LLC v. Jahelka (In re Jahelka), 2010 Bankr. LEXIS
11 4933 (Bankr. N.D. Ill. 2010) a creditor asserted that Debtor, the president and
12 shareholder of a small, closely-held corporation, participated with others in leading
13 the creditor to believe that the corporation had the ability to cover its losses on a
14 margin account that the creditor opened for the corporation when in fact the
15 corporation had been rendered unable to do so. The creditor objected to the debtor's
16 discharge under, inter alia, §§ 727(a)(3) and (a)(5).

17 The court held, the objection to a chapter 11 debtor's discharge under § 727(a)
18 is premature when raised before a chapter plan has been proposed. Section 727(a) is
19 applicable to Chapter 11 cases only in the limited circumstances covered by §
20 1141(d)(3), which requires that the debtor has proposed a plan providing for the
21 liquidation of all or substantially all of the property of the estate. "With no plan
22 before the court, any consideration of section 1141(d)(3)—and therefore section
23 727(a)—is premature."

24 Third, although Plaintiff argues that the language of section 1141(d)(5)(C)
25 mirrors that of section 727(a)(12), that argument is irrelevant because (1) section
26 1141(d)(5)(C) was not included in the Complaint as a cause of action, and (2) Section
27 727(a)(12) is inapplicable to chapter 11 bankruptcy cases as set forth above.
28

1 Thus, all of the 727 Causes of Action must be dismissed by the Court because these causes
2 of action are only applicable to chapter 7 individual debtors. The Debtor herein and the bankruptcy
3 case is a chapter 11 bankruptcy case.

4 For the foregoing reasons, Klein respectfully request that the Court grant the Motion. The
5 deficiencies evident from the face of the Complaint warrant a dismissal of the 727 Causes of
6 Action with prejudice.

7 DATED: September 13, 2023

KOGAN LAW FIRM, APC
Michael S. Kogan

9
10 Bv: /s/Michael S. Kogan
11 Michael S. Kogan
12 Attorneys for Leslie Klein
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28 In re: LESLIE KLEIN

CHAPTER: 11
CASE NUMBER: 2:23-bk-10990-SK

In re: LESLIE KLEIN

Debtor(s).

Joseph Vago and Erica Vago v Leslie Klein

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Adv. No. 2:23-ap-01150-SK

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 11500 W. Olympic Blvd., Suite 400, Los Angeles, California 90064

A true and correct copy of the foregoing document described as **Reply to Opposition to Motion for Order Dismissing Certain Causes of Action in Complaint** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On **September 13, 2023**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

☒ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):

On **September 13, 2023**, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☒ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

September 13, 2023

Date

Pamela Lynn

Type Name

/s/Pamela Lynn

Signature

In re: LESLIE KLEIN

Debtor(s).

Joseph Vago and Erica Vago v Leslie Klein

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ADDITIONAL SERVICE INFORMATION (if needed):

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II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL - VIA U.S. MAIL

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